U.S. Department of Labor Board of Alien Labor Certification Appeals
800 K Street, N.W.
Washington, D.C. 20001-8002

Date: February 1, 1999

Case No.: 1996-INA-0326

In the Matter of:

SCOTT PHILLIPS,
Employer

On Behalf Of:

PHYLLIS GAFFOOR,
Alien

Certifying Officer: Dolores DeHaan, Region II

Appearance: Tibby Blum
For the Employer/Alien

Before: Huddleston, Jarvis and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On August 18, 1994, Scott W. Phillips ("Employer") filed an application for labor certification to enable Phyllis Gaffoor ("Alien") to fill the position of Cook, Live-In (AF 7-8). The job duties for the position are:

> Will plan menus and will cook meat, sauces, vegetables and other foods for all household meals, as well as special dinners and dinner parties; Will estimate food consumption and will requisition and purchase foodstuffs; Will receive and check foodstuffs and supplies for quality and quantity; Will select and develop recipes.

The requirements for the position are two years' experience in the job offered or two years in the related occupation as Cook/Domestic. No smoking on premises is listed as a special requirement by the employer.

The CO issued a Notice of Findings on December 5, 1995 (AF 37-40), proposing to deny certification on three grounds: Employer failed to document the required one year of alien's paid experience in the tasks to be performed, 20 C.F.R. 656.21(a); the job does not constitute permanent, full-time employment, 20 C.F.R. 656.50[2]; and, the live-in requirement is unduly restrictive, 20 C.F.R. 656.21(b)(2)(i). The CO noted that the live-in requirement is not normally required for a Cook position, as defined in the Dictionary of Occupational Titles (DOT), and is therefore unduly restrictive in the absence of a showing of business necessity. (AF 39). The CO stated that "[t]he circumstances of [Employer's] household indicated in the application do not appear to justify the need for a live-in worker." (AF 39). The CO further stated that "[i]t does not appear feasible that these [job] duties constitute permanent, full-time employment in the context of household circumstances identified, on a live-in, or a live-out basis for that matter." (AF 39).

Apparently combining the issues of the unduly restrictive nature of the live-in requirement and the existence of full-time employment, the CO stated that Employer "may rebut this finding by: **a**. [a]mending the application to indicate a permanent, full-time job offer and schedule which can be accommodated in circumstances of this household: or **b**: [s]ubmiting evidence that the requirement for any permanent full-time cook services arises from a business necessity rather than employer preference or convenience." (AF 39). The CO specified several items of evidence Employer's rebuttal should include: number and ages of children in the home; number of meals to

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

[2] Recodified on October 23, 1991 as 20 C.F.R. 656.3.

be prepared daily and weekly; the length of time required to prepare each meal; the identity of those individuals for whom the worker will be preparing meals on a daily basis; for the twelve months preceding the filing of the application, the dates on which Employer entertained, the business or personal nature of the entertainment, the number of meals served, the time and duration of the meals, and the names of people entertained within 7 the last two months and the dates on which they were entertained; a list of non-cooking duties to be performed by worker, if any; tax or social security records showing that Employer has employed a full-time cook in the past or documentation of changed circumstances creating the current need for a full-time cook; a statement addressing how, when, and by whom all general household duties including cleaning, laundry, and vacuuming, will be performed; daily and weekly work schedules of Employer and his wife; school schedules for Employer's children; and an explanation of how the children will be cared for when the parents are absent from the home. (AF 38).

The CO further noted that Employer failed to document one year paid experience in the tasks to be performed, as required by 20 C.F.R. 656.21(a). (AF 37). The CO directed Employer to submit evidence documenting that Alien had one year's past paid experience in the tasks to be performed, where such experience was not gained while in the employ of Employer. (AF 37).

Accordingly, the Employer was notified that it had until January 9, 1996, to rebut the findings or to cure the defects noted. (AF 40). On December 13, 1995 Employer requested that the deadline for filing its rebuttal be extended to February 8, 1995 [sic]. (AF 41). On December 15, 1995, the CO extended the deadline to February 11, 1996. (AF 42).

In its rebuttal, dated February 8, 1996, Employer stated that his professional schedule, as well as that of his wife, involves long hours as well as frequent entertainment. (AF 62). Employer submitted a household entertainment calendar covering the period from December 1994 through December 1995 and detailing 64 entertaining occasions. (AF 52-58). Employer claimed to typically entertain guests in his home three or four times per week. (AF 62). Because much of his entertainment schedule is arranged "on the spur of the moment," Employer considers attempts to use catering services unworkable. (AF 61). Employer submitted a schedule detailing the worker's activities on every weekday (AF 49-51), a copy of the contract between Employer and Alien (AF 48), and a letter from a previous employer detailing Alien's two and one-half years previous paid experience in which her duties included cooking, general domestic work, and child care. (AF 47). Employer stated that his "standard daily work schedule is from 7:00 a.m. until 8:00 p.m. five days a week though [he] often work[s] later on the weekends." (AF 60). Employer further stated that his "wife typically works from 7:00 a.m. until 6:00 p.m. five days a week but also is frequently called away for emergencies and is on-call one weekend a month when she stays overnight at the hospital." (AF 60). Employer failed to provide evidence that they had previously employed a full-time cook, but indicated a change of circumstances in that they had recently moved from Riverdale, NY to Montclair, NJ. (AF 61). Employer responded to the CO's request for an explanation of how the children will be cared for during the parents absence from the home by stating that a nanny will supervise the children during those times. (AF 60). Employer noted that the children are seven, four, and two years old. (AF 60). The seven year old, according to Employer, attends school on weekdays between 8:30 a.m. and 3:30 p.m. and participates in a variety of extracurricular activities. (AF 60). The four year old goes to school full-time five days

a week. (AF 60). Employer concluded by stating that the "two year old child goes to pre-school once a week, but in September [1996] will attend three times a week for half a day." (AF 60).

The CO issued the Final Determination on February 20, 1996 (AF 70-73), denying certification on three grounds: Employer failed to document the required one year of alien's paid experience in the tasks to be performed, 20 C.F.R. 656.21(a); the job does not constitute permanent, full-time employment, 20 C.F.R. 656.3; and, the live-in requirement is unduly restrictive, 20 C.F.R. 656.21(b)(2)(i). The CO questioned the necessity for a fill-time cook, whether on a live-in or a live-out basis. (AF 72). According to the CO, nothing in Employer's rebuttal evidence indicates a change in circumstances causing Employer to need a full-time cook. (AF 72). The CO specifically questioned the need for a live-in cook, stating that Employer failed to provide evidence that their entertaining needs cannot be filled by local caterers. (AF 72). The CO found Employer's statements regarding their child care[3] arrangements "questionable" in light of the fact that Alien presently furnishes child care services to Employer. (AF 71). The CO concluded "that a permanent, full-time, and live-in job for duties described, those of a Cook, has not been documented." (AF 71).

The CO found Employer's documentation of one year past paid experience in the tasks to be performed insufficient. (AF 71). The CO noted apparent discrepancies in the spelling of the name of the previous employer and the lack of detail regarding the proportion of Alien's duties which involved cooking. (AF 71).

On March 15, 1996, Employer submitted a motion for reconsideration of the denial of alien labor certification or, alternatively, an appeal of that denial to an Administrative Law Judge. (AF 92-93). On March 26, 1996 the CO denied reconsideration on the grounds that Employer had failed to raise any issues that could not have been addressed in the rebuttal. (AF 94). The CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board") on April 29, 1996.

Discussion

This appeal raises three issues: if Employer satisfied the requirement at Section 656.21(a)(3)(iii) of documentation of one year's full employment in the duties to be performed; if the job offer is for permanent, full-time employment as defined at section 656.3; and, if the live-in requirement violates the prohibition at Section 656.21(b)(2) against unduly restrictive job requirements.

When the application for alien labor certification involves a job offer as a live-in household domestic service worker, the employer must document, *inter alia*, that the alien possesses the equivalent of one full year's employment in the tasks to be performed. 20 C.F.R. 656.21(a)(3)(iii)(A). The DOT designates the position of domestic cook as a domestic service occupation as follows:

305.281-010 COOK (domestic ser.)
Plans menus and cooks meals, in private home, according to recipes or tastes of employer: Peels, washes, trims, and prepares vegetables and meats for cooking. Cooks vegetables and bakes breads and pastries. Boils, broils, fries, and roasts meats. Plans menus and orders foodstuffs. Cleans kitchen and cooking utensils. May serve meals. May perform seasonal cooking duties, such as preserving and canning fruits and vegetables, and making jellies. May prepare fancy dishes and pastries. May prepare food for special diets.

May work closely with persons performing household or nursing duties. May specialize in preparing and serving dinner for employed, retired, or other persons and be designated Family-Dinner Service Specialist (domestic ser.).

Therefore, when the position of domestic cook is offered with a live-in requirements, the provisions of 20 C.F.R. § 656.21(a)(3)(iii)(A) are applicable. The CO properly required the Employer to document that the alien had a total paid experience equal to one full year's experience in the job offered, *ie*, domestic cook for employers other than the Employer. While the alien did have approximately 2 years of experience as a general domestic worker (AF 68 and 2) (with cooking duties), that experience does not automatically demonstrate 1 year of paid experience as a domestic cook. The Employer's attorney argues in rebuttal that during the two years the alien worked for Clyod Crosby her duties included "cooking, general domestic and childcare." We have no reason to doubt the accuracy of this evidence that the alien worked for Mr. Crosby, and that her duties included, **in part**, cooking. However, there is no proof that this part time cooking amounted to as much as 1 full year as a domestic cook (full-time cook).

Accordingly, the CO's denial of labor certification must be affirmed on this grounds alone, and the remaining issues are rendered moot.

ORDER

The Final Determination of the Certifying Officer is hereby **AFFIRMED.**

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.